

1986 February 15

[LORIS. J.]

IN THE MATTER OF ARTICLE 146  
OF THE CONSTITUTION

COSTAS HADJIGAVRIEL,

*Applicant.*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE MINISTER OF DEFENCE,

*Respondent.*

(Case No. 391/85).

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*Omission—Constitution, Article 146.1—Meaning of “omission”  
in said Article.*

*Time within which to file a recourse—Constitution, Article 146.3  
—Letter communicating sub judice decision written on  
7.3.85—Recourse filed on 30.5.85—No evidence as re- 5  
gards delay in delivery of said letter—Letter must have  
been communicated the maximum within a week—There-  
fore, the recourse was filed out of time.*

*Administrative act—Executory—An act confirmatory of a pre- 10  
vious act lacks executory character.*

*The National Guard Law 1964 as amended—S. 9(1)—Com-  
petency under said section assigned to the Minister of  
Interior and Defence by a decision of the Council of  
Ministers dated 7.9.67—In view of the provisions of s.  
10(3) of Law 22/78, the said assignment was not rendered 15  
inoperative by reason of the amendment of s. 9(1) by  
section 3 of Law 22/78.*

On 19.7.84 applicant enlisted in the National Guard.  
On 12.12.84 applicant’s father wrote on behalf of the 20  
applicant to the respondent Minister requesting applicant’s  
release from the National Guard on account of special

circumstances, pursuant to the provisions of s. 9(1) of the National Guard Law 1964 as amended. By letter dated 10.1.85 by the Ministry of Defence to applicant's father the latter was informed that applicant's request was turned  
5 down as no special circumstances existed justifying his release.

On 14.2.83 a letter was addressed by a lawyer on behalf of applicant to the said Minister praying likewise for his release from the National Guard. The letter dated  
10 14.2.85 is identical with the letter dated 12.12.84, it contains no new material and invokes the provisions of the same section of the Law. On 7.3.85 the respondent addressed a letter to applicant's lawyer, turning down his said request dated 14.2.85.

15 As a result applicant filed the present recourse praying:

- (a) For a declaration that the refusal to release him from the National Guard is null and void and
- (b) For a declaration that the omission to release him from the National Guard is null and void.

20 Counsel for the applicant argued, inter alia, that the effect of the amendment of s. 9(1) of the said Law by s. 3 of Law 22/78, whereby a proviso was added to s. 9(1) making reference to the Council of Ministers rendered inoperative the decision of the Council of Ministers  
25 under No. 6980 of 7.9.67 whereby the power of the Council of Ministers under s. 9(1) had been assigned to the Minister of Interior and Defence and that, therefore, in the absence of a new assignment the respondent Minister had no competence to deal with the matter.

30 *Held, dismissing the recourse:* (1) An omission in the sense of Article 146.1 of the Constitution presupposes that no action had been taken by the Administration in the matter in question. As in this case a decision was taken, the motion for relief (b) is ill-founded.

35 (2) This recourse was filed on 30.5.85. Although nothing was said by either side the letter of 7.3.85 must have been communicated to applicant's counsel on the same day

or the maximum within a week. The recourse is, therefore, out of time.

(3) Assuming that the delivery of the letter of the 7.3.85 was unduly delayed, then this recourse cannot succeed as the said letter does not contain a decision of an executory character. The maximum it contains is a confirmatory decision of the previous one contained in the letter of 10.1.85. 5

(4) The submission as regards the matter of competency is ill-founded in view of the provisions of s. 10(3) of Law 22/78. 10

*Recourse dismissed.  
No order as to costs.*

**Cases referred to:**

*Police Association v. The Republic* (1972) 3 C.L.R. 1; 15

*Goulielmos v. Republic* (1983) 3 C.L.R. 883;

*Moran v. The Republic*, 1 R.S.C.C. 10;

*Protopapas v. The Republic* (1967) 3 C.L.R. 411;

*Theodorou v. The Republic* (1974) 3 C.L.R. 213.

**Recourse.** 20

Recourse against (a) the refusal of the respondent to release the applicant from the National Guard due to special circumstances, and (b) against the omission of the respondent to release the applicant from the National Guard due to special circumstances. 25

*A. S. Angelides with Ch. Ierides*, for the applicant.

*A. Vassiliades*, for the respondent.

*Cur. adv. vult.*

LORIS J. read the following judgment. The motion for relief, in the present recourse, as framed is twofold: 30

1. In paragraph 1 of the motion, the relief sought is a

declaratory judgment to the effect that the refusal and/or decision of the respondent Minister of Defence (without any reference being made to the time of the refusal and/or decision mentioned) not to release the applicant from the National Guard owing to special circumstances, be declared null and devoid of any legal effect.

2. In paragraph 2 of the motion the relief sought is a declaratory judgment to the effect that the omission of the respondent Minister of Defence to release the applicant from the National Guard owing to special circumstances be declared null and devoid of any legal effect and what was omitted to be performed.

The undisputed facts of this case are very briefly as follows:

The applicant who was born on 28.7.1957, in Nicosia, was called up for enlistment in the National Guard in January, 1975.

His enlistment was suspended as follows:

- (a) From January 1975 - 15.7.75 in order to be enabled to complete his secondary education at Kykko Gymnasium.
- (b) From 15.7.75 - 12.1.77 on account of service at the time with the National Guard of his brother Michalakis
- (c) From 16.7.80 - 16.9.82 on account of service with the National Guard of his brother Marios.

On 8.2.76 the applicant, being suspended from service as aforesaid, was allowed to travel abroad in order to attend the University of East Anglia, Norwich, U. K.; the applicant attended the aforesaid University having graduated therefrom in July 1979. (He obtained B.A. (Honours) in Economics).

From January 1980 till the end of August, 1980, he had further studies in Boulder, Colorado U.S.A. with the Economic Institute of the American Economic Association and obtained a diploma of the said Association in Mathematical and Statistical Economics.

From September, 1980 up to May 1983, the applicant continued Post Graduate Studies for M.A. Economics and M.B.A. Business with the Universities of Colorado Boulder and the University of Northrop (California) respectively, where he would continue studying up to the end of December, 1984, had his passport been in force. 5

As applicant's passport needed renewal, applicant returned to Cyprus in 1984 and on 19.7.1984 he enlisted with the National Guard as the period of his suspension from service had already expired. 10

On 12.12.84 an application on behalf of the applicant was addressed by applicant's father to the respondent Minister (vide reds 9, 10, 11 in ex. 1) praying for the release of the applicant from the National Guard on account of special circumstances, pursuant to the provisions of s. 9(1) of the National Guard Law, 1964, as amended. 15

On 10.1.85 a letter of even date, was addressed to applicant's father (vide red 14 in ex. 1) from the Ministry of Defence turning down the request for the release of the applicant from the National Guard; it is stated in the aforesaid letter inter alia that "from the examination of the facts of the case of your son it was found out that no special circumstances exist justifying his release". 20

On 14.2.85 a letter was addressed by a lawyer acting on behalf of the applicant to the respondent Minister (vide red 19 - 22 in exh. 1) praying likewise for the release of the applicant from the National Guard; it must be noted that the letter of 14.2.85 is identical with the letter of 12.12.84, it contains no new material, and invokes likewise the provisions of s. 9(1) of the National Guard Law, 1964, as amended, for the release of the applicant. 30

On 7.3.85 the respondent addressed a letter to applicant's counsel (vide red 24 in exh. 1), turning down the request of the applicant for release contained in the Second Application i.e. the application 14.2.85. 35

It is apparent from the undisputed facts appearing above, that motion for relief No. 2 is ill-founded and must be dismissed forthwith as omission in the sense of Article 146.1

“presupposes that no action has been taken by the administration in the matter in question”. (*Police Association v. The Republic*, (1972) 3 C.L.R. 1, *Goulielmos v. Republic*, (1983) 3 C.L.R. 883 at p. 902), whilst in the present case  
5 there was a decision taken not only once but twice, a matter which will be dealt with immediately hereinbelow.

I repeat: As it is apparent from the facts stated above which are undisputed and they emerge from the material in the administrative file which is exh. 1 before me, the respondent Minister communicated his decision twice:  
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(a) On 10.1.85 to applicant’s father (red 14 in exh. 1)

(b) On 7.3.85 to applicant’s counsel (red 24 in exh. 1)

The present recourse was filed on 30.5.1985. Even assuming that the decision contained in the letter of 7.3.85  
15 was of an executory nature, again the present recourse having been filed in 30.5.1985 was filed more than 75 days after the 7.3.1985; “It is correct that this point has not been raised by counsel for respondent but is a matter which this Court is bound to note of its own motion in  
20 view of the fact that Article 146.3 is a mandatory provision which has to be applied in the public interest.” (*Vide Moran and the Republic*, 1 R.S.C.C. 10 at p. 13, *Protopoulos v. The Republic*, (1967) 3 C.L.R. 411 at p. 416).

Although nothing was said before me by either side and  
25 in spite of the fact that nothing appears in the material placed before me, the letter of 7.3.85 must have been communicated to the counsel for applicant either on the same day or the maximum within a week, in which case the recourse having been filed on 30.5.85 is definitely out of  
30 time.

Assuming that the letter of 7.3.85 was unduly delayed—and I repeat there is nothing to that effect before me, not even an allegation on behalf of the applicant—then this recourse could not succeed as the letter of 7.3.85 does not  
35 contain a decision of an executory character; the maximum it contains is a confirmatory decision of the previous one contained in the letter of the respondent dated 10.1.85 as the material placed before the respondent with a view to

re-examining his decision of 10.1.85 was identical with the material placed before him in the first instance; this is clear from the administrative file and a remark to that effect is made in Red 23 which appears in the file exh. 1.

It is clear to my mind that the decision contained in the letter of the respondent of 7.3.85 is merely confirmatory of the previous one, indicating the adherence of the administration to its original decision communicated to the applicant by means of letter dated 10.1.85 as aforesaid. (Vide in this connection *Theodorou v. The Republic*, (1974) 3 C.L.R. 213 at p. 219; *Goulielmos v. The Republic*, (1983) 3 C.L.R. 883 at p. 903). 5 10

Having held already that there is no continuous omission the present recourse is not justiciable, having been filed out of time, and is therefore doomed to failure. 15

In the circumstances, I shall not enter into the merits of the case although I feel duty-bound before concluding to deal as briefly as possible with a point raised by learned counsel for applicant in his written address in reply and touched upon briefly, at the clarification stage. The point was raised by learned counsel for applicants, as follows: 20

The competence under s. 9(1) of the National Guard Law 1964 as amended lay with the Council of Ministers. In spite of the fact (a) that Law 23/62 validly conferred power to the Council of Ministers to assign such competence to the Minister of Interior, and in spite of the fact (b) that the Council of Ministers by their decision No. 6980 of 7.9.67 have assigned such competence to the Minister of Interior in respect of s. 9(1) of the National Guard Law 1964 as amended by Law 26/65—yet the new amendment (it was maintained) of s. 9(1) by the addition to it of a proviso on 27.4.78 (vide s. 3 of Law 22/78) which proviso makes reference to the Council of Ministers again, renders the decision of the Council of Ministers under No. 6980 of 7.9.67 inoperative any more, and unless a new assignment by the Council of Ministers is made to the Minister of Defence, the latter has no competence to deal with matters falling under s. 9(1) of the National Guard Law 1964 as amended by s. 6 of Law 26/65 and s. 3 of Law 22/78. 25 30 35

I hold the view that the above submission is ill-founded in view of the provisions of s. 10(3) of Law 22/78; no new assignment is therefore required by the Council of Ministers to the Minister of Defence.

- 5 For all the above reasons, the present recourse fails and it is accordingly dismissed. Let there be no order as to costs.

*Recourse dismissed.  
No order as to costs.*